73-143

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-143

CALLIOPE THEODORIES, widow of PETE PATTERSON, Individually, and as Administratrix of the Succession of Pete Patterson, etc.
Plaintiff

versus

HERCULES NAVIGATION CO., INC., (eliminated as defendant)

and

PETERSON MARINE SERVICES, INC.,
Defendant

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (No.72-2746)

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IN THE
SUPREME COURT OF THE UNITED STATES

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NO.

CALLIOPE THEODORIES, widow of PETE PATTERSON, Individually, and as Administratrix of the Succession of Pete Patterson, etc.,

Plaintiff

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HERCULES NAVIGATION CO., INC., (eliminated as defendant)

and

PETERSON MARINE SERVICES, INC.,

Defendant

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (No. 72-2746)

Mrs. Calliope Theodories, widow of Pete Patterson, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled matter on March 29, 1973 (rehearing denied April 23, 1973).

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section G, supporting its judgment

in favor of plaintiff, and against defendant, Hercules Navigation Co., Inc., in the amount of One Hundred Twenty-eight Thousand and no/100 ($128,000.00) Dollars, with a carry-over judgment against Peterson Marine Service, Inc., in said amount, is printed in Appendix "A", and is unreported.

The opinion of the United States Court of Appeals for the Fifth Circuit, ordering a remand, is printed in Appendix "B", and is reported at 448 F2d,701.

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section H (after remand), supporting judgment in favor of all defendants, and against plaintiffs, dismissing plaintiff's suit, is printed in Appendix "C", and is unreported.

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit, entered March 29, 1973, (No. 72-2746), is printed in Appendix "D", and is reported at 474 Fed. 2d 1345 (1973).

JURISPRUDENCE INVOLVED

(1) Britt vs. Mangum; 261 NC 250, 134 SE 2d 235, 4 ALR, 3rd 551 (1964)

(2) Brugh vs. Bigelow; 310 Mich. 74, 16 NW 2d, 668 158 ALR 184 (1944)

(3) Carney v. Buyea, 271 App. Div. 338, 65 NYS 2d 902

(4) Kossick v. United Fruit Co. (NY 1961) 81 S Ct 886, 365 US 731, 6 L. Ed. 2d 56; rehearing denied 81 S.Ct.

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(5) Longacre v. Reddick; 215 SW, 2d, 404 (1948)

(6) Lynch vs. Fisher, 34 So. 2d, 513 (1947)

(7) Saylor v. Parsons, 122 Iowa 679, 98 NW 500, 64 LRA 542 (1904)

(8) Wagner vs. International RR Co.; 232 NY 176, 133 NE 437 (1921)

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The negligent acts or omissions complained of having taken place on the navigable waters of the United States, the general maritime law is applicable. The Plymouth, 3 Wall 20, 70 U.S. 20, 18 L. Ed. (1866)

QUESTIONS PRESENTED

(1) Does Theodories v. Hercules Navigation Co., et al (#72-2746) 474, Fed. 2d 1345, abolish the established rescue doctrine which grants recovery to a rescuer injured while saving a victim who has imperiled himself by his own negligence?

(2) Does Theodories v. Hercules Navigation Co., et al (No. 72-2746) 474 Fed. 2d 1345, abolish the concept of "respondeat superior" in maritime rescue cases and substitute for it a rule of "caveat salvator"?

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) United States Code.

STATEMENT OF THE CASE

The essential facts of the case are not in dispute and present a death to a rescuer who is injured as a result of his efforts and excitement in attempting to rescue contractor's employee who has been imperiled as a result of his own negligence.

On April 5, 1966, Peterson Marine Services, Inc., was engaged in cleaning coal dust from the SS DEMETRIOS, a Greek ship, berthed at the Port of New Orleans.

Two of Peterson's employees, Herman Evans and George Barrociere, (the eventual victim), were in the No. 5 hold 'tween deck, at work. They had completed one area and decided to work on the opposite side. Evans, the "straw-boss", crossed around the 'tween deck opening while Barrociere held the only available light so that Evans could navigate. Evans told everyone else to stay put, and he yelled to the men on the top deck to lower an additional light, so the work could be completed. After Evans had been calling for twenty-five minutes for his men on deck to lower an additional light, Barrociere (the victim), contrary to prior instructions, apparently moved in the dark in an attempt to cross over or around the opening to help call for the lights.

The fall to the bottom of the ship seriously injured Barrociere. He was bleeding

and had broken bones, requiring immediate medical attention, which could only be administered to him by removing him up to the main deck and getting him immediately to a hospital. Virtually everyone on board the vessel, except the ship's Captain, who was below decks, rushed to hold No. 5 to see what could be done. Decedent, Pete Patterson, a former Greek ship's officer and port captain, upon arriving at hold No. 5, started to run around the deck and shout orders in Greek to the seamen, in order for them to get a stretcher ready to lower into the hold. When the stretcher and lines were brought to No. 5 hold, Pete Patterson proceeded to shove one of the seamen out of the way, speaking to him in Greek, and picked up the line, retying it to the stretcher, so it could be lowered into the hold. While in the process, he suddenly stopped, grabbed his chest and headed for the salon amid ship, where he died shortly thereafter of ventricular fibrulation of an acute myocardial infarction as the result of his exertion and excitement while participating in the rescue operation. Patterson was neither a member of the crew nor an employee of either shipowner, it's agent or contractor, and it is undisputed he was present for purely personal reasons.

The original district court, Judge James Comiskey presiding, rendered judgment on December 22, 1969, in favor of plaintiff and against Hercules Navigation Co., Inc., for $128,000.00, based on unseaworthiness due in inadequate lighting, and granted a carryover judgment in favor of Hercules against contractor, Peterson Marine Services, Inc., for breach of warranty of workmanlike performance.

On appeal, the Fifth Circuit Court of

Appeals reversed the District Court on the finding of unseaworthiness, and remanded the case back to the District Court. (448 Fed. 2d 701).

Judge Comiskey recused himself, and the case was realloted to Section H. On June 22, 1972, the Honorable R. Blake West, Judge of Division H, denying summary judgment motions of both plaintiff and of defendant, Peterson Marine Services, Inc., entered an opinion in judgment, dismissing plaintiff's claim against all defendants (Appendix C).

On the 29th of March, 1973, the United States Court of Appeals for the Fifth Circuit, rendered a judgment affirming the District Court's dismissal of plaintiff's suit, per curiam, and without opinion. (Appendix D).

On 23 April, 1973, an application for rehearing to the United States Court of Appeals, Fifth Circuit was denied.

REASONS FOR GRANTING WRIT

Has the Fifth Circuit Court of Appeals, by its per curiam in this case, affirming the judgment of the lower court, dismissing plaintiff's suit, established a new doctrine, to-wit:

"Caveat Salvator"?

The affirmation of the lower court's judgment in this case, constitutes establishing a new rule in the Fifth Circuit, to-wit:- That all future maritime rescuers must ascertain, before answering "the cry of distress' who imperiled the victim. If the victim imperiled himself, while in the course and scope of his employment, the potential rescuer acts

at his own risk!

The Fifth Circuit Court of Appeals affirmed, without reasons, a district court's judgment refusing to permit a maritime rescuer to recover from the employer of a victim who imperiled himself, while about his master's business. Must all future Amphibious Good Samaritans ascertain, before embarking on rescue operations, who imperiled the victim?

Is the maritime rescuer to recover if a third person negligently imperiled the victim, but not if the victim places himself in danger through his own fault?

The per curiam decision, affirming the lower court's dismissal in this case is in conflict with prevailing State Law and presents an important question of Federal Law, never settled by this Court, which if it stands, will have the effect of repealing the established doctrine that the victim who imperils himself is responsible to his rescuer. Is "respondeat superior" in maritime rescue to be replaced by "caveat salvator"?

THE DECISION AFFIRMED BELOW

The District Court Judge, Honorable R. Blake West, in his decision of June 23, 1972, stated:-

> "Recovery by plaintiffs would be possible if it could be said that the negligence of any defendant caused contractor's employee to fall into the hold. However, the Court of Appeals, noting that the lighting in the area

> of the accident was sufficient" and "adequate", held that the employee's accident was a result of his own"... Cavalier disregard of even the most elemental precautions..." 448 F 2d 706." (Appendix "C")

The Fifth Circuit Court of Appeals, in affirming Judge West, has apparently approved a judgment in conflict with the widespread universally accepted jurisprudence on the rescue doctrine, concurred in by leading legal scholars, namely, that a rescuer can recover from a victim and his employer, if the victim negligently imperils himself while in the course and scope of his employment.

ESTABLISHED RESCUE DOCTRINE

This doctrine is succiently set forth in 4 A.L.R. 3rd 558 (560):-

> "Nearly all courts support the view that a rescuer who sustains injuries in reasonably undertaking a rescue may recover from the rescued person if the latter's negligence created the situation which necessitated the rescue."

Furthermore, in Prosser on Torts, Chapter 6, pages 172-173; the following can be found:

> "In the light of recent decisions holding that one who negligently endangers his own safety becomes liable to his recuer, it appears that the Courts, at least, have fully accepted the extension, and consider that the

rescue is always to be considered as an integral part of the original risk."

If the victim who imperils himself is responsible to his rescuer, it follows that the victim who imperils himself while about his master's business, causes his master to be vicariously responsible to the rescuer.

Britt v. Mangum, 261 N.C. 250, 134 SE 2d 235, 4 ALR 3d 551 (1965)
Butler v. Jersey Coast News Co., 109 N.J.C. 255, 160 A. 659 (1932)
Rushton v. Howle, 79 G. App. 360, 53 S.E., 2d 768 (1949)
Longacre v. Reddick, 215 S.W. 2d 404 (1948)
Louisiana Civil Code Articles 2317 and 2320.
33 La. Law Review 110 Master's Vicarious Liability for Torts under article 2320 - A terminological "tar baby"
4 Harvard L. Rev. 345, 355 (1891) Holmes, Agency

In the present case, contractor's employee, Barrociere, negligently injured himself by putting down a cluster light, and attempting to walk around the 'tween deck hatch opening in the dark, thus causing himself to fall into the hold. (448 F2d 706)

Plaintiff's decedent, Pete Patterson, as a result of his efforts and excitement, in participating in the rescue of the critically injured Barrociere, suffered a heart attack and died. All this occurred while Barrociere, the negligent employee, was at work in the course and scope of his employment.

Since a victim who negligently places himself in peril is liable to his rescuer, it follows that if said injury occurred while he is acting in the course and scope of his employment, that the rescuer, injured as a result of his participation in the rescue, can recover from the employer of the victim, under Respondeat Superior.

RESPONDEAT SUPERIOR OR CAVEAT SALVATOR?

The Anglo-American or common-law doctrine comparable to the Louisiana master-servant doctrine is labeled "Respondeat Superior", the Louisiana Civil Code articles reflecting the civilian concept are articles 2317-2320. The doctrine has been discussed variously by a number of legal scholars. See Holmes, Agency, 4 Harvard Law Review 345-355 (1891); also Laski, The Basis of Vicarious Liability, 26 Yale Law Journal 105, 112 (1916); also see T. Baty, Vicarious Liability 28 (1916), also Wigmore, Responsibility for Tortious Acts; Its History,in Three Select Essays in Anglo-American Legal History, 536 (1909). Pothier, Obligations; No. 21 (Evans Trans.1839).

Almost universally, scholars have justified or supported the concept of respondeat superior on the basis that the victim of the servant's carelessness is "more innocent" than the master or employer; and O. W. Holmes, at 4 Harvard Law Review 345, in tracing the common-law source of the doctrine through "Frithborh" or "Frankpledge" Saxon origin to the doctrine of Patria Potestas of Roman law, says: "Thus in torts, it is sometimes said 'that the liability of the master is in effect for employing a

careless servant', repeating the reason offered by the pseudo-philosophy of the Roman jurists for an exceptional rule introduced by Praetor on the ground of public policy...."

In 35 American Jurisprudence Section 561, the doctrine is stated thus: "According to the weight and trend of modern authority, the liability of employer for the acts of employee, depends not upon whether the act of the employee was willful and intentional or unintentional, but upon whether the employee, when he did the wrong, was acting in the prosecution of the employer's business, and within the scope of his authority..."

In section 559 of 35 Am. Jur. we find the following, "The Courts are generally agreed that an employer may be held accountable for the wrongful act of his employee committed while acting in his employer's business and within his employment, although he had no knowledge thereof, or had disapproved it, or even expressly forbidden it."

Accordingly, why should the employer not be responsible for the harm resulting to a rescuer when his employee's negligence in placing himself in peril created the necessity for the rescue?

A trucking firm, whose driver gets drunk at a truck stop along his route and recklessly imperils a pedestrian, is liable. If the same truck driver, sober, negligently drives off the road and imperils only himself, in his burning truck, is his employer liable to a rescuer injured while pulling him to safety? The Texas appellate courts decided that the truck owner was vicariously

responsible. See Longacre vs. Reddick; 215 S.W. 2d 404, 4 ALR 3rd, 556 (1948); and Britt v. Mangum, 261 N.C. 250, 134 SE 2d 235, 4 ALR 3rd 551.

At this juncture it should be noted that decedent, Patterson, was not a member of the ship's crew or a longshoreman or an employee of contractor, but was lawfully on board the vessel, as a guest of the ship's chandler. Accordingly, the decedent was not barred from recovery against Peterson Marine Services, Inc., by the longshoreman and harborworker's act.

The claim here urged is only against the contractor, Peterson Marine Services, Inc., under the rescue doctrine as it has developed in the jurisprudence since Wagner v. International RR Co., 232 N.Y. 176, 133 N.E. 437 (1921); the unseaworthiness claim having been disposed of by the prior appeal and remand (see appendix B).

OVERWHELMING WEIGHT OF AUTHORITY

The particular version of the rescue doctrine permitting a recovery against the victim who places himself in peril through his own negligence, can be found in the following authorities:

Britt v. Mangum, 261 N.C. 250, 134 SE 2d 235, 4 ALR 3rd 551
Brugh v. Bigelow, 310 Mich. 74, 16 N.W. 2d 668, 158 ALR 184
Butler v. Jersey Coast News Co. (1932) 109 NJL 225, 160 A 659
Carney v. Buyea (1946) 271 App. Div. 338, 64 NYS 2d 902 app. den. 271 App. Div. 949, 68 NYS 2d 446

Lynch v. Fisher, 34 So. 2d 513 (1947)
Talbot v. Talbot, 199 N.Y.S. 2d 212, 22 Misc. 2d 782 (1961)
Usry v. Small, 103 Ga. App. 144, 118 S.E. 2d 714 (1961)
38 Am. Jurisp. 229, p. 914, note 6 (Pocket Part)
4 A.L.R. 3rd 558 - 564 (1965)
19 A.L.R. 4
158 A.L.R. 189, 190
166 A.L.R. 756
38 Fordham Law Review 587 (1970)
2 Harper & James - The Law of Torts, 1956, (1361-1429)
34 Modern Law Review 241 (255), May 1971
10 Alberta Law Review 89 (1971)

Unfortunately, the second trial judge, attempting to operate from the printed record, depositions, etc., and without hearing argument or having the benefit of briefs, erroneously concluded that there must be negligence by some defendant TOWARD contractor's employee, Barrociere, the victim, for the rescuer to recover.

The Fifth Circuit Court of Appeals, by its per curiam, affirmed this decision. However, under the Rescue Doctrine established in the jurisprudence as set out in 4 A.L.R. 3rd 558, and elsewhere, it is clear that the trial court's reasoning is erroneous, and in conflict with virtually all existing applicable state law on the rescue doctrine, and instead adopts the rationale of the case of Saylor vs. Parsons (1904) 122 Iowa 679, 98 NW 500; the only rescue case cited by defendant-contractor in its brief, below.

IS SAYLOR VS. PARSONS TO BECOME THE FEDERAL LAW OF ADMIRALTY?

Although according to the extensive

annotation in 4 A.L.R. 3rd 558, the case of Saylor vs. Parsons has not been followed but repudiated in almost every jurisdiction including the Iowa Supreme Court, the second trial court, below, seemed to base its decision denying recovery at least in part, as did the trial court in Saylor vs. Parsons, on plaintiff's failure to make out a case under ordinary tort principles, i.e., a failure to show negligence by any defendant directly TOWARD the victim.

Allowing this decision to stand will constitute installing the rationale of Saylor vs. Parsons as the federal rule in admiralty - rescue situations, while simultaneously rejecting the weight of authority in the United States which has universally repudiated Saylor vs. Parsons.

4 A.L.R. 3rd 558
Bohlen, Studies in the Law of Torts - First Edition, Page 269
Restatement of Torts 2nd, section 445, and 472
38 Am. Jurisprudence - Negligence, Section 229, page 914 (Pocket Parts)
Britt v. Mangum, 261 NC 250, 134 SE 2d 235, 4 ALR 3d 551 (1964)
Brugh v. Bigelow, 310 Mich. 74, 16 NW 2d 668, 158 ALR 184 (1944)
Carney v. Buyea 271 App. Div. 338 65 NYS 2d 902 (1946)

Not even in its State of origin has the Saylor case been followed. The Iowa Supreme Court has repeatedly adopted the modern, universally accepted approach to rescue, even where the victim causes his own peril. See - Clayton v. Blair, 254 Iowa 372, 117 N.W. 2d 879, 881; S. Ct. of Iowa (1962) and Henneman vs. McCalla, 260

Iowa 60, 148 NW 2d 447; S. Ct. of Iowa (1967); 27 Iowa Law Rev. 2 (at 27 and 28)

The enlightened view is stated almost identically by Bohlen and in the A.L.R. and the American Jurisprudence Articles cited above:

> "Nearly all Courts support the view that a rescuer who sustains injuries in reasonably undertaking a rescue may recover from the rescued person if the latter's negligence created the situation which necessitated the rescue." 38 Am. Jur. Sec. 229 (1970 Pocket Part)
>
> "In any event, nearly all the opinions in the cases allowing recovery indicate that the courts were aware of the Saylor case and either deliberately declined to follow it or distinguished it on its facts, and it does not seem likely that future courts will see fit to revive its teachings." 4 A.L.R. 3rd 559.
>
> "A person who carelessly exposes himself to danger... in a place where others may be expected to be, does commit a wrongful act towards them in that it exposes them to a recognizable risk of injury." Bohlen, Studies in the Law of Torts, 1st Ed., page 269.

The second Trial Judge below could not find any negligence TOWARD the victim by any defendant, and so denied recovery to the rescuer:-

> "Recovery by plaintiffs would be possible if it could be said that the negligence of any defendant caused

contractor's employee to fall into the hold" (Appendix "C")

Professor Bohlen, in the single sentence quoted above from his treatise, shows the error of the trial court; that it is the wrongful act toward potential rescuers, by carelessly exposing one's self to danger, inviting rescue, that makes recovery possible, not negligence toward the victim.

Although this version of the rescue doctrine is not actually new, and has developed over many years in the jurisprudence of the states, with recognition by the text writers, it is nevertheless a novel question in Federal Maritime Jurisprudence, and the proper subject for decision by this court, under the holding of Kossick vs. United Fruit Co., 365 US 731 (1960).

That this Court's guidance and direction is necessary in matters marine, and particularly when there is an apparent conflict between the laws or jurisprudence of the States and a Federal Appellate Court, cannot be seriously questioned.

"For all the branches of jurisprudence, the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property. The law of salvage, a distinctively maritime branch of the law, is the historical forerunner of latter day doctrines which supposedly reflect the more enlightened and humane outlook of contemporary society. Maritime law in every way and in every context encourages the salvor to salve - to save."

"the admiralty would be the first to accord great liberalty to this doctrine. Indeed, as the admiralty looks at it, the greater the risk, the greater the seafaring man's obligation to respond, and the greater the risk, the greater is the reward where awards can be made." Grigsby vs. Coastal Marine Service of Texas, Inc., 412 Fed. 2d 1011

WHAT ABOUT PROXIMATE CAUSE AND FORESEEABILITY?

In many rescue cases, the injury to the good samaritan is not the direct result of the negligence causing the victim's peril. In many instances the direct cause of injury to the rescuer is the result of some hurried act of the rescuer, unintentionally self-inflicted; or the act of third persons; but always arising out of the rescue effort.

In the famous Wagner case, Judge Cardozo declared:

"The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer...the risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."

It is interesting to note in the Wagner case that the defenses that the railroad personnel were competent to handle the rescue operations, and that Wagner was a

meddler whose help was not solicited and whose interference was not warranted, were both rejected by Judge Cardozo. It should also be noted that in the famous Wagner case, the plaintiff, a passenger on the train, was not invited by the conductor to go on the train trestle at night to look for his cousin. He went of his own volition. His attempt was futile, and accomplished nothing except his falling off the trestle and injuring himself; nevertheless his voluntary attempt at assistance constituted participation in a rescue, and he was permitted recovery.

A tort feasor who creates a peril calling for a rescue, as set out by Judge Cardozo, may not actually foresee the coming of a deliverer, but he is charged with legally foreseeing that anyone - a passer-by, onlooker, less than competent assistant rescuer, or a rescuer with a bodily defect, such as a weak abdominal fascia (hernia-prone) or a weak or pre-damaged heart - may become the deliverer. As is pointed out by Professor Linden in 10 Alberta L. Rev. 89 (1971); and, as in the famous Wagner case, the rescuer may actually contribute nothing to the rescue effort except to get himself injured. He nevertheless is permitted recovery.

> "That the particular injurious consequences was 'improbable' or 'not to be reasonably expected' is no defense. Wharton, Law of Negligence (2nd Ed.) Sec. 77. The same writer says: 'The fact is, that the consequences of negligence are almost invariably surprises...'" Lynch v. Fisher, 34 So. 2d 513 (1948)

In the body of rescue law, the interwoven concepts of "proximate cause" and "foreseeability", and "cause in fact" have been either stretched or contracted to suit the particular "boundaries of policy" of the particular Court making the ultimate judgment upon liability. It is submitted that the policy of the U. S. Supreme Court should be stated for the guidance of the Federal Circuits, and that its policy should be consistent with the well reasoned version of the Rescue Doctrine already ex-- tant. Potential Maritime life salvors should not be discouraged from answering "the cry of distress" by the knowledge that recovery for their injuries in so doing may be denied if the victim created his own peril.

Palsgraff Revisited, Prosser, 52 Mich. L. Rev. 1 (1953)
Down with Foreseeability, Allen M. Linden, 47 Canadian Bar Rev. 545 (1967)
Rescuers and Good Samaritans, Allen M. Linden, 34 Modern Law Review 241 (1971)
Ruminations on Dixie Drive It Yourself, by Wex S. Malone, 30 La. L. Rev.363 (1970)

CONCLUSION

Because life salvage in admiralty is of great importance to maritime commerce and industry, and because this case presents a novel question in Federal Maritime Jurisprudence, never before taken up by this Court; and because a United States Circuit Court has sustained a judgment in direct conflict with the prevailing jurisprudence of the various states, it is respectfully

submitted that a writ of certiorari should issue.

Respectfully submitted,

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PROOF OF SERVICE

I, HAROLD H. WEDIG, attorney for the petitioner in the foregoing application for writ of certiorari, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing application for writ on:

Mr. C. Ellis Henican
Henican, James and Cleveland
Suite 4440, 1 Shell Square
New Orleans, Louisiana 70139

and

Mr. Donald Lindquist
Chaffe, McCall, Phillips,
Toler & Sarpy
Suite 1500, National Bank of
Commerce Bldg.
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By mailing a copy thereof, postage prepaid, addressed to their respective offices, this 17th day of July, 1973.

HAROLD H. WEDIG

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CALLIOPE THEODORIES, WIDOW OF PETE PATTERSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF PETE PATTERSON (PANAGIOTIS D. PAPADOPOULOS) AND AS NATURAL TUTRIX FOR AND ON BEHALF OF HER MINOR CHILD, DIOGENES P. PAPADOPOULOS (PATTERSON)
PLAINTIFF

CIVIL ACTION
NUMBER 67-231

VERSUS

(Filed: Nov. 28, 1970)

HERCULES NAVIGATION CO., INC., CARRAS MARITIME CORP., PETERSON MARINE SERVICES, INC., AETNA CASUALTY AND SURETY CO.
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having considered the pleadings, the testimony presented at trial, the exhibits, and the law, finds as follows:

FINDINGS OF FACT

Petitioner, Mrs. Calliope Patterson individually, as administratrix of her husband's succession, and as natural tutrix of her minor child, Diogenes P. Patterson, seeks damages for the death of Pete Patterson, her husband.

Pete Patterson, while acting in an

ergency and trying to render aid to and/
rescue George Barrociere, an employee
Peterson Marine Services, Inc., met his
th aboard the SS DEMITRIOS on the night
April 5, 1966. The cause of death was
acute myocardial infarct.

Petitioner alleged unseaworthiness and
ligence against Hercules Navigation Co.,
., and Carras Maritime Corp., the owners
/or operators of the SS DEMITRIOS, and
ligence against Peterson Marine Services,
., and their insurer, LaSalle National
urance Co.

THE SS DEMITRIOS, on the date of Pete
terson's wrongful death, was docked in
igable waters of the United States with-
Louisiana's boundaries.

Petitioner proceeds under Louisiana Civil
e Article 2315, Louisiana's wrongful
th statute, as her procedure device or
icle for recovery. Under recent juris-
dence, Article 2315 has been held to
ompass the maritime concept of unsea-
thiness.
The evidence presented at the time of
trial causes the Court to find the
lowing:

1.

The SS DEMITRIOS is a standard American
erty ship, its specifications set out
Plaintiff's Exhibit P-1.

2.

The SS DERMITRIOS was owed by Hercules
igation Co., Inc., on the date of Pete
terson's death. At this time, Carras
itime Corp. was the ship's agent.

3.

The SS DEMITRIOS arrived at the Press Street Wharf in New Orleans on the morning of April 4, 1966, and was to take on a cargo of grain at Baton Rouge.

4.

While the SS DEMITRIOS was moored in navigable waters of the United States alongside the Press Street Wharf in New Orleans, her holds were filled with coal dust, remnants from a prior coal cargo.

5.

On May 24, 1966, Fred Krause, owner of Central Shipping Agency, Inc., the SS DEMITRIOS' agent in New Orleans, entered into a contract with Peterson Marine Services, Inc., to clean the SS DEMITRIOS' holds while she was at the port of New Orleans.

6.

Peterson Marine Services, Inc., is a New Orleans owned business with 32 prior years of marine experience to ship owners, operators and agents, being a specialist in cleaning, painting and maintaining vessels.

7.

On the night of April 5, 1966, two of Peterson Marine Service, Inc.'s employees, Herman Evans and George Barrociere, were in the No 5 hold of the SS DEMITRIOS, along with several of their fellow employees, for purpose of finishing and completing the scraping job in said hold.

8.

At this time, both Herman Evans and George Barrociere were in the employ and on the payroll of Peterson Marine Services, Inc.

9.

Herman Evans and George Barrociere were occupied with the 'tween deck of the No. 5 hold, and were located on the port side. There were two hanging lights in the hold -- one on the port side and one on the starboard side.

10.

The portable lighting equipment in the No. 5 hold was the property of Peterson Marine Services, Inc.; these lights were connected either to the ship's generator or to the wharves.

11.

Herman Evans, the bumper (straw-boss), decided that the work was finished on the side where they were, and decided to work on the opposite side. He asked George Barrociere to hold a light on him while he traveled to the opposite or starboard side. Upon arriving there, he found he did not have enough light, and yelled to the men on the top deck around No. 5 hold to lower another light.

12.

Herman Evans waited and continued to call out for some 20 or 25 minutes for his men on deck to lower lights when he heard a thud, which was George Barrociere falling down into the No. 5 hold.

13.

After George Barrociere fell into the bottom of No. 5 hold, and Herman Evans yelled "a man fell in the hold", the lights finally came down from that main deck sufficiently illuminating the hold.

14.

On the evening of April 5, 1966, Pete Patterson, age 43, accompanied his friend, John Fatsis, the ship chandler, aboard the SS DEMITRIOS.

15.

Peter Patterson was financially indebted to John Fatsis. Fatsis called Patterson earlier the day of his death and asked Patterson to help him with providing provisions for the SS DEMITRIOS. Patterson helped Fatsis put groceries in Fatsis' station wagon, drove with him to the Press Street Wharf, and accompanied Fatsis aboard the SS DEMITRIOS to have certain invoices and/or delivery slips signed.

16.

Patterson was in the captain's room having coffee and/or brandy with the port captain, Marcos Vorrias, John Fatsis, Fred Krause, Dean Peterson, Ken LeSieur, and others.

17.

Suddenly, a seaman or an employee of Peterson Marine Services, Inc., came into the room and announced that a man had fallen in hold No. 5.

18.

All of the parties in the room, including Pete Patterson, immediately got up and ran hurriedly down two flights of steps and across the deck to the rear of the vessel to hold No. 5.

19.

Gathering around and looking down in hold No. 5, it was obvious to these men that George Barrociere, down below on the bottom of hold No. 5, was bleeding, seriously injured and covered with blood.

20.

Immediately Dean Peterson and Port Captain Marcos Vorrias went down hold No 5, with Captain John Fatsis beaming a flashlight ahead of them in order to illuminate their way down the ladder.

21.

Pete Patterson, a former ship's officer and port captain, immediately started to shout orders in Greek to the Greek seamen standing around hold No. 5, in order for them to get the stretcher ready to lower into the hold to bring George Barrociere up to top deck.

22.

The decedent, Pete Patterson, was seen running about the deck shouting orders to the Greek seamen and doing the utmost to organize the rescue party. The Greet seamen followed his orders.

23.

When the stretcher and lines were brought to hold No. 5, Pete Patterson stopped one of the seamen, who was tying knots to the corners of the stretcher, and began to re-tie the knot, and while trying one knot he suddenly stopped, grabbed his chest, and headed toward the salon, amidships.

24.

Pete Patterson went to the salon, suffered excruciating chest pains, and within a few minutes he died of an acute myocardial infarction as the direct result of his exertion and excitement while participating in the rescuse of George Barrociere.

25.

Pete Patterson was pronounced dead upon the SS DEMITRIOS. The diagnosis of the pathologist performing the autopsy was acute myocardial infact, coronary arteriosclerosis, recent thrombosis and visceral congestion.

26.

At the time immediately prior to death, Pete Patterson was aboard the SS DEMITRIOS for legitimate business purposes and during part of this time he became a rescuer.

27.

George Barrociere, an employee of Peterson Marine Service, Inc. was aboard the SS DEMITRIOS as a scraper and hold cleaner,a duty traditionally performed by seamen.

28.

The unseaworthiness of the SS DEMITRICS

caused by the inadequate lighting in the hold through the actions or lack thereof by Peterson Marine Services, Inc., created an emergency and necessitated a rescue operation, the participating in which brought about Pete Patterson's death.

29.

The SS DEMITRIOS was unseaworthy in that it was shown:

(1) The lighting in Hold No. 5 was inadequate for the employees of Peterson Marine Services, Inc., to properly perform their tasks;

(2) A certain light was hung too high to properly illuminate Hold No. 5 'tween deck;

(3) The inadequate lighting for the 'tween deck in Hold No. 5 was caused by the light being hung in an area too remote from the 'tween deck area.

(4) The deck personnel were not alert and attentive to raise and lower lights in Hold No. 5.

30.

Peterson Marine Services, Inc., breached its warranty of workmanlike performance by creating the unseaworthy condition aboard the SS DEMITRIOS as follows:

(1) Failure to provide adequate lighting for its employees in Hold No. 5's 'tween deck;

(2) Failure to furnish and maintain a

safe place to work for their employees;

(3) Failure to provide alert and attentive employees on top deck to raise or lower the lights hanging in Hold No. 5;

(4) Failure of those deck employees to respond timely to the calls for adequate lighting in Hold No. 5.

31.

Peter Patterson had no previous knowledge of a heart condition. He had had a complete physical examination, including heart and blood pressure, shortly before his death, and no abnormalities were found. Under the circumstances, Pete Patterson was not guilty of contributory negligence.

32.

There is no break in the continuity of the events flowing from the initial unseaworthiness of the SS DEMITRIOS caused by the lack of diligence and workmanlike performance of Peterson Marine Services, Inc., which injured George Barrociere and imperiled his life, and ultimately resulted in, or brought about, the death of Peter Patterson.

33.

It follows that the unseaworthiness of the SS DEMITRIOS created by Peterson Marine Services, Inc., was the proximate cause of Pete Patterson's death.

34.

Pete Patterson was 43 years of age at the date of his death. He is survived by

his wife, who was also 43 years old, and a son Diogenes, age 9. Pete Patterson was self-employed as a restaurant owner, but at the time of his death was planning to return to work for Lykes Bros. Steamship Co., Inc. at a salary of $600 per month. Pete Patterson had been born in Athens, Greece, educated at a maritime academy, the equivalent of a high school education, had been a ship's officer, a port captain and a restaurant owner.

Pete Patterson spoke several languages, always tried to improve on his English, which he spoke quite fluently, and has often translated various Greek letters and documents.

35.

Decedent had, at the time of his death, a life expectancy of 26.84 years according to Table of American Experience - Mortality as found in Louisiana Revised Statutes, Table #6.

36.

A reasonable assessment of quantum in this case results in the following awards:

To Mrs. Calliope Theodories, widow of Pete Patterson, the sum of $60,000 for loss of support and the sum of $25,000 for loss of love, affection and consortium, to Diogenes P. Patterson the sum of $18,000 for the loss of support and the sum of $25,000 for the loss of parental guidance.

CONCLUSIONS OF LAW

(A) PROXIMATE CAUSE

The key issue in all injury cases involving a chain of events which culminates in injury or death is that of proximate cause.

Pete Patterson, the decedent herein, immediately before his death, was participating in a rescue operation, inter alia, giving orders to seamen and running up and down the deck, "doing the most" to get a stretcher lower into Hold No. 5, in order to bring the injured and bleeding Barrociere to top deck, so that medical aid could be administered to him.

From the testimony of the various witnesses, it must be concluded that there was an obvious emergency. From the moment that notice was given to the master of the vessel and the port captain, the decedent and others in the captain's quarters, every one concerned rushed to Hold No. 5 to see what could be done to assist the injured man. John Fatsis, the ship chandler, testified that decedent was shouting orders to the seamen in Greek and "doing the most" to get the rescue operation going above deck. The port captain and Dean Peterson, who was in charge of cleaning the ship, both went down into the hold to directly administer to the injured man. The agent for the ship at New Orleans, Fred Krause, testified that decedent was "running up and down the deck, shouting orders." He also testified that the Greek seamen apparently were following decedent's orders in connection with obtaining rigging and an emergency basket to be lowered into the hold. The various testimony leaves no doubt that decedent was actively participating in the rescue operation and that he even tied one of the knots in the rescue

basket, which he thought was not being properly done by one of the seamen, just before he suffered the heart attack.

> "A rescuer is favored in the eyes of the law." Lynch v. Fisher, 41 S.2d 692 (1949).
> In Corpus Juris Secundum, Sec. 63, negligence:
> "One who has, through his negligence, endangered the safety of another, man be held liable for injuries sustained by a third person in attempting to save such other form injury."

The Restatement of Torts, Sections 294, 445 and 472, says that if the negligent acts of the defendant places X or Y's property in undue peril, then this is negligence to potential rescuers as a class. In other words, those not in danger but nevertheless stimulated to rescue X from defendant, placing him in peril, may recover from the defendant, as defendant ought to have foreseen a rescue.

Quoting extensively from Lynch v. Fisher, 34 S. 2d 513 (1948):

> "We think it is well established that the general doctrine of foreseeability is not applicable to the extent of relieving one who sets in motion, through the agency of a negligent act, a chain of circumstances leading to the final resultant injury. In Payne v. Georgetown Lumber Co., Ltd., 117 La. 983, 42 S. 475, 477, the Court said:
>
> "'That the particular injurious consequences was "improbable" or "not to be reasonably expected is no defense.

Wharton, Law of Negligence (2d Ed.) S. 77. The same writer says:

"'The fact is, that the consequences of negligence are almost invariably surprises...'
"Referring again to the Restatement of the Law o Torts, we find in Sec. 435 a plain and unambiguous statement of the principle which refutes the requirement of foreseeability:
'If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable.'

Rescue cases themselves are a special part of our jurisprudence, and because a rescuer is one who arises to the heights of man's superior instincts, he is treated with favor.

This conclusion is enunciated in the proposition, dealt with in detail, in 19 ALR 13, 158 ALR 189, 166 ALR 752, 42 ALR (2d) 494:

"The proximate cause of injury to one who voluntarily interposes to save lives of persons imperiled by the fault of others is the fault which causes the peril."

Not only is this a universally accepted proposition, but it is a holding in Lynch v. Fisher, 34 So.(2d) 513(1948), and Grigsby v. Coastal Marins Service of Texas, Inc., 235 F.Supp. 94 (1964).

Both of the previously cited cases are Lousiana cases, both are rescue cases with spread-out chains of causation, and both granted recovery for the injury and death to the rescuer.

In the instant case, the defendants probably could not foresee the type of injury here occurring to the rescuer. However, there is no break in the continuity of the incidents flowing from the original condition of unseaworthiness. That the rescuer may suffer a heart attack from his effort and excitement is more directly connected in the instant case than in the Lynch case, which is cited in Grigsby as authority.

In Blanchard v. Reliable Transfer Co., 71 G.App. 843, 32 S.E.(2d) 420(1944), cited herein for purposes of uniformity of law, defendant's truck was improperly parked and caused an accident between a gasoline truck and an ambulance. Plaintiff, owner of the ambulance, arose from his bed, heard the crash, and went to the rescue of the persons injured. He suffered a heart attack caused by his overexertion and excitement.

The court held that under these facts plaintiff had started a cause of action against the owner of the transfer truck - he could recover for such injuries during his efforts to rescue.

The defendant was "charged with the knowledge that if he injured a person by his negligence someone might reasonably be expected to attempt to rescue, and it does not matter by what circumstances the rescuer appears on the scene." (Emphasis supplied)

The defense that defendant could not have foreseen plaintiff getting out of his bed, going to the rescue, and having a heart attack as a result thereof was rejected.

Furthermore, the court added:

> "Saving of life from exposure or danger of death from lack of immediate medical care is just as effective as rescue from the wheels of a train."

The general rule could not be more clearly stated than at 166 A.L.R. 755:

> "Proximate causation will ordinarily be made out where plaintiff received the injuries in the course of an effort to rescue or aid others involved in the accident."

A rescue is of itself a "common impulse", or in the words of Justice Cardozo, "a child of the occasion." Wagner v. International R.R. Co. N.Y., 133 N.E. 437 (1921).

A rescue itself does not and cannot break the chain of causation.

In Hatch v. Smail, 249 Wis. 183,23 N.W. (2d) 460 (1946), again being cited for uniformity of law, as well as Am. Jur. Neg. S. 70:

> "An intervening act which is a normal response to the stimulus of a situation created by the actor's negligent conduct is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about."

Of course, no legal treatise discussing
oximate cause can be complete without
oting the eloquent words of Justice
rdozo in Wagner v. International R.R. Co.
Y., 133 N.E. 437 (1921):

"Danger invites rescue. The cry of distress in the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and the probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.... The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the the coming of a deliverer. He is accountable as if he had." (Emphasis supplied)

WARRANTY OF SEAWORTHINESS AS IT APPLIES TO GEORGE BARROCIERE

On the night of April 3, 1966, George
rrociere was injured on board the SS
MITRIOS while he was on the payroll of
terson Marine Services, Inc., and during
e scope of said employment.

His occupation at that time, and correspondingly his duties, was to scrape coal
st from beams in the No. 5 hatch.

Irrefutably, George Barrociere was
rforming work traditionally done by
amen. He was therefore, under the
lding of Seas Shipping Co. v. Sieracki,
8 U.S. 85, 1946, A.M.C. 698, pro hoc
ce a seaman, and thus entitled to the
nefits of the warranty of seaworthiness

of the vessel on board which he was working.

(C) WARRANTY OF SEAWORTHINESS AS IT APPLIES TO PETE PATTERSON

Pete Patterson, as a business invitee, under the controlling case of Kermarec v. Companie Generals Trans., 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.(2) 550, 1959 A.M.C. 597 (1958), is owed a high standard of care by the owner of the vessel.

But, Pete Patterson is in a favored category by law. He is a rescuer, and when he becomes a rescuer aboard a ship, aiding a seaman, he in effect, becomes a Sieracki seaman.

Quoting extensively from Gribsby v. Coastal Marine Service, 5th Circuit Court of Appeals, No. 22451 (1969):

> "...the admiralty must be the one most hospitable to the impulses of man and law to save life and limb and property." (p. 16)
>
> "Whatever restrictions there might be on the admiralty concept of salvage as to the significance of any supposed duty on the part of Gregsby to rescue a fellow employee of Olin, there can be none at all with regard to third persons in the employ of others and rightfully aboard the vessel at the time of rescue." (Emphasis supplied) (p. 18)
>
> "His impulsive action in the best tradition of the sea gave him this highly preferred status." (Emphasis supplied) (p. 18)
>
> "....he was doing that which a seaman

responding to the call of the sea would have done, he was...in the Sieracki-sense, doing the work of a seaman. He can accordingly claim the rights of a vicarious seaman including that of the warranty of seaworthiness." (p. 18)

"It is well to reemphasize here that the duty of seaworthiness arises because Grigsby had the vicarious status of a seaman - either as one engaged in life salvage or, as a corollary, one engaged in the Good Samaritan rescue of Sonnier and Morgan, each of whom admittedly were doing repair work, the traditional work of seamen to thus become vicarious seamen themselves." (p. 36-37)

Further, Pete Patterson is owed the warranty of seaworthiness by reason that his widow is proceeding under Louisiana Civil Code Article 2315.

"Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

The Grigsby case has conclusively and explicitly defined "fault" under Article 2315 to encompass unseaworthiness, as well as negligence. Thus citing:

"We agree, too, with the district court's view that because of Louisiana's commitment to civil law, Louisiana would be the last jurisdiction to put a narrow interpretation on 'fault' that would rule out as an applicable standard the maritime principle of seaworthiness."

Also see Lamy, 11 Loyola L.R. 213-229 (Maritime Death Recoveries in La. Under Unseaworthiness - an affirmative view)

(D) LACK OF CONTRIBUTORY NEGLIGENCE ON THE PART OF PETE PATTERSON

It has been conclusively proven that Pete Patterson did not know he had a heart condition. He therefore could not have had any knowledge that his strenuous efforts and activities while engaging in the rescue would cause his death. He, therefore, is free frim any contributory negligence.

The law on this point is clear and favors the rescuer.

Louisiana has set the standard in Callais v. Furniture Showrooms, Inc., 231 S.2d 537 (La. App. 1968):

> "One who acts upon sudden impulse as 'rescuer' or 'good Samaritan' in coming to the aid of another in danger, peril or distress, is not guilty of contributory negligence in exposing himself to a known or obvious danger, if under similar circumstances an ordinarily prudent person might have done likewise, or if the attempted rescue was not such as to make the effort rash and reckless in the judgment of an ordinarily prudent person."

This same principle permeates 19 A.L.R. 13, 158 A.L.R. 189, 166 A.L.R. 752, and 42 A.L.R. (2d) 494. That is, efforts to rescue will not be considered negligence (contributory negligence) if they are not rash or wanton.

By the same principle, neither shall Pete Patterson's attempt to rescue an injured seaman be considered rash or wanton.

An injured seaman is owed a rescue. The Grigsby case (previously cited) clearly

states:

> "his impulsive action in the best tradition of the sea gave him this highly preferred status." (p. 18).

Pete Patterson was a former seaman and ship's officer - it was only a natural reaction for him to try to help a fellow seaman in peril.

There is no question that the unseaworthiness in Hold No. 5 was the proximate cause of the heart injury and eventual death of Pete Patterson.

The chain of events are linked; there are no breaks in the chain of causation. Each flows naturally from the other.

The consecutive order of the events are as follows:

(1) Improper lighting in Hold No. 5's 'tween deck, caused and permitted by the unseaworthy condition of the SS DEMITRIOS, and this unseaworthy condition resulted in

(2) George Barrociere, a Sieracki seaman, falling from the 'tween deck to the bottom of the No. 5 hold, where he lay bleeding and injured.

(3) Pete Patterson, arriving on top deck of No. 5 Hold, seeing the bloodied body of George Barrociere on the bottom - at which time or immediately thereafter neither the port captain, ship captain, nor Dean Peterson was present - Pete Patterson, being a former ship's officer, ordered the Greek seamen,

inter alia, to get the stretcher ready, they respond to his orders, and he ties at least one knot to the stretcher, and in general "does the most" to help George Barrociere.

(4)At this time he suffers an acute myocardial infarct as a direct result of the effort of his participation in the rescue, and dies shortly afterwards.

It cannot be doubted - the proximate cause of injury to the rescuer is the fault which causes the peril. The unseaworthiness caused George Barrociere to fall - thus this same unseaworthiness caused, in a legal sense the death of Pete Patterson.

Let judgment be entered in favor of the plaintiff against respondents Hercules Navigation Co., Inc., owner of the SS DEMITRIOS, and further let judgment be entered in favor of Hercules Navigation Co., Inc., owner of the SS DEMITRIOS, against Peterson Marine Service, Inc., for all sums for which Hercules Navigation Co., Inc. is a cast and for all reasonable attorneys' fees and costs.

s/ James A. Comiskey

UNITED STATES DISTRICT JUDGE

New Orleans,Louisiana

November 26th, 1969.

APPENDIX B

U. S. COURT OF APPEALS
FILED
SEP 20 1971
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CLERK

ORIGINAL

CORRECTED

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 29460

CALLIOPE THEODORIES, Widow of PETE PATTERSON, Individually and as Administratrix of the Succession of PETE PATTERSON, Etc.,
Plaintiff-Appellee,

versus

HERCULES NAVIGATION CO., INC.,
Defendant-Appellant-
Cross-Appellee,

versus

PETERSON MARINE SERVICES, INC.,
Third Party Defendant-
Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(September 20, 1971)

Before BROWN, Chief Judge, WISDOM and MORGAN, Circuit Judges.

2 THEODORIES v. HERCULES NAVIGATION

BROWN, Chief Judge: In this *Grigsby*-style[1] litigation we are confronted with a variety of issues arising from a shipboard injury and the death of the amphibious Good Samaritan who attempted to assist the unfortunate accident victim. However, most of the juridical complexities are vaporized, and discussion of them short-circuited, by our conviction that the District Court's critical finding on the issue of unseaworthiness is not supported by the evidence. The judgment must therefore be reversed.

The Contractor Takes Over

The controversy centers around SS DIMITRIOS, a standard American Liberty ship owned by Shipowner.[2] Docked in navigable waters at the Press Street Wharf in New Orleans, the vessel was scheduled to take on a cargo of bulk grain at Baton Rouge, and in order to pass the National Cargo Bureau's inspection the ship's five holds had to be cleared of dust and debris left by a previous shipment of coal. For this purpose Shipowners' New Orleans agent contracted with Contractor,[3] an experienced marine maintenance specialist, for the cleaning crew and equipment necessary to perform the job. On the night of April 5, 1966 a crew of about 40 Contractor employees boarded SS DIMITRIOS and began the cleaning operations.

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[1]Grigsby v. Coastal Marine Service of Texas, Inc., 5 Cir., 1969, 412 F.2d 1011, *cert. dismissed*, 1970, 396 U.S. 1033, 90 S.Ct. 612, 24 L.Ed.2d 531; United States v. Gavagan, 5 Cir., 1960, 280 F.2d 319, *cert. denied*, 1961, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365.

[2]Hercules Navigation Company.

[3]Peterson Marine Services.

Sometime between the hours of ten and eleven o'clock several of Contractor's men — including Evans, the foreman, and Barrociere, the unsuspecting accident victim — were completing the finishing and scraping of the No. 5 hold tween deck. They were using portable lighting equipment furnished by Contractor, with power supplied either from the ship's generators or from the wharf.[4] Apparently satisfied that the work on the port side was finished, Evans handed the portable extension light to Barrociere and, *after instructing him to stay where he was*[5] and to direct the light toward the open hatch on the starboard side, walked to the other side in order to adjust the extension lights already located there.

Man Into Hold

The lights were hanging too high, and Evans called to the hands on the main deck to lower them, but for some reason, after a delay of from twenty to twenty-five minutes, they were not moved. Then, contrary

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[4]We find it unnecessary to independently evaluate the extended, confused and frequently conflicting testimony on such questions as who owned the lights (Shipowner and Contractor each claims the other provided them) and whether they remained on at all times (Barrociere testified the lights went out completely, leaving him in total darkness). The evidence clearly supports the District Court's findings that there were two light clusters being used for the work on the No. 5 hold tween deck, one on the port and one on the starboard side, and that the lights belonged to Contractor.

[5]The uncontradicted testimony of Evans establishes that he clearly and plainly told Barrociere not to move. "I told him just stay out, make sure and told the other fellows, now, don't you all move, because it was dark after he put the light pointing away on the other side for me to see to make a round. I told them, now, you all stay where you all are, don't you all move around." (App. 194)

to his previous instructions, Barrociere laid down the extension light he was holding and began walking from the port side toward Evans on the starboard side. In doing so he fell through the open hatch to the bottom of No. 5 hold, suffering serious injuries. Evans yelled to the men on the main deck that a man had fallen in the hold, and the additional lights he had requested were finally lowered.

Comes The Good Samaritan

Word of the accident was immediately passed around the ship, and within a few minutes the Master, Chief Officer and practically the entire deck crew of the vessel, in addition to various longshoremen and shore personnel, were gathered on the main deck of No. 5 hold. From this position they could all see that Barrociere, lying at the bottom of the hold, was bleeding profusely and was in obvious need of emergency treatment.

Among the on-lookers was Panagiotis D. Papadopoulos (Pete Patterson), a 43-year-old Greek seaman and former restaurateur, who earlier in the evening had boarded the vessel with a friend who had business to transact with members of the ship's crew. Patterson himself was neither a member of the crew nor an employee of either Shipowner, its agent or Contractor, and it is undisputed he was present for purely personal reasons.[6] When word of the accident came he was drinking coffee in the Master's cabin and, along with

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[6]He was, however, owed the maritime duty of due care. Kermarec v. Companie General Transatlantique, 1959, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550, 1959 A.M.C. 597.

almost everyone else on board, ran to the topside scene of the accident.

While the ship's port captain and Peterson, Contractor's president, descended into the hold to assist Barrociere, Patterson began giving orders in Greek to the other seamen on the main deck, directing them to rig a stretcher that could be lowered to the injured man. After the necessary equipment had been brought aft, Patterson pushed aside an individual who was attempting to tie a tag line to one corner of the stretcher and began making the line fast himself. While doing so he suddenly stopped, clutched his chest and staggered toward the salon amidships where, after efforts to revive him failed, he died a few hours later. The cause of death was diagnosed as a heart attack.

The Shipowner Loses

Patterson's widow then instituted suit against Shipowner and Contractor, grounding her claim on the unseaworthiness of the vessel and the negligence of the defendants. Both defendants cross-claimed against each other. The District Court, sitting without a jury, held that SS DIMITRIOS was unseaworthy because of inadequate lighting in hold No. 5, that the unseaworthy condition was the proximate cause of Barrociere's injury, that the accident in turn created an emergency and necessitated a rescue operation in which Pete Patterson was a participant, and that Patterson's death was "the direct result of his exertion and excitement while participating in the rescue." In reliance upon these findings and our decision in *Grigsby*, judgment was entered in favor of the widow and minor

child in the total amount of $~~12,000~~ 125,000, with judgment for that amount in favor of Shipowner against Contractor for breach of the WWLP.[7]

How Far Good Samaritan?

Obviously the circumstances of this case — with no breach of duty to Patterson up to that time and an unexpected, unforeseen cardiac failure after only slight exertion — draw us toward the imprecise and as yet unexplored outer limits of the *Grigsby* doctrine, including the still undecided question of whether the amphibious Good Samaritan is afforded the blanket protection of the warranty of seaworthiness when his injury or death results, not directly from the unseaworthy condition itself, but from a succession of events only tenuously related, in a causal sense, to the original condition.[8] But we need not here determine precisely how

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[7] The warranty of workmanlike performance. Grigsby v. Coastal Marine Service of Texas, Inc., *supra*, 412 F.2d at 1040; Boutte v. M/V Malay Maru, 5 Cir., 1967, 370 F.2d 906. Some saltwater lawyers think it should more properly be called WOW. See S. Bradley, Maritime Contracts on the Western Rivers, 38 Insurance Counsel Journal 372, 373 (July 1971).

[8] This is merely another way of saying that in *Grigsby* we did not discuss at all the issue of proximate cause asserted now by both Shipowner and Contractor, and we did not discuss it because it was not there in issue. In *Grigsby* the death of the maritime salvor was the direct consequence of the same unseaworthy condition that necessitated the rescue: carbon monoxide gas in the barge's wing tank. Here the District Court found that the death of Patterson was caused by a heart attack, which was caused by the strain and excitement of the rescue, which was caused by the injury to Barrociere, which was caused by the unseaworthiness of the vessel. Viewed from any angle this sort of for-want-of-a-nail-the-shoe-was-lost "proximate cause" stretches both *Grigsby* logic and the limits of the English language very, very far, and an audible recitation

wide a berth *Grigsby* requires in view of our finding that, on these facts, the crucial and ultimate fact of unseaworthiness has not been established.

Of course the standard by which we are bound in reviewing factual or legal-factual findings of this sort is the seagoing Plimsoll Line variant of the clearly erroneous rule, *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, 1954 A.M.C. 1999; *Mississippi Shipping Co., Inc. v. Zander and Co., Inc.*, 5 Cir, 1959, 270 F.2d 345, 347, 1960 A.M.C. 247, *judg't vacated*, 1959, 361 U.S. 115, 80 S.Ct. 212, 4 L.Ed.2d 148; *D/S Ove Skou v. Hebert*, 5 Cir., 1966, 365 F.2d 341, 347, 1966 A.M.C. 2223; *Oil Screw Noah's Ark v. Bentley & Felton Corp.*, 5 Cir., 1963, 322 F.2d 3, 5, 1964 A.M.C. 59; *Compagnia Maritima La Empressa, S.A. v. Pickard*, 5 Cir., 1963, 320 F.2d 829, 830. The standard, while a stringent one, still permits us — and at times compels us — to give effect to the "qualitative factor of the truth and right of the case — the impression that a fundamentally wrong result has been reached." Oil Screw Noah's Ark, *supra*, at 5-6; *W.R.B. Corp.*

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proves it, for it sounds more than a little strange to say that Patterson's death on the well-lighted main deck was "caused" by inadequate lighting in hold No. 5.

Compounding the problem, expert medical testimony established that Patterson had suffered a coronary thrombosis nearly eighteen hours before his death and that even without excessive exertion or excitement the mortality rate in such cases was nearly 20% (App. 152-53, 165). In addition there was much discussion of the exertion caused when Patterson ran down ladders and across the deck to No. 5 hold. Whether Patterson's death, then, was even "caused" on this showing — much less "proximately caused" — by the accident is an obviously significant (if undecided) question. We assume the evidence warranted the implied medico-legal fact.

v. Greer, 5 Cir., 1963, 313 F.2d 750, 753. Particularly is this true when there is more or less general agreement on fundamental facts and disagreement only with respect to the ultimate fact of seaworthiness and the legal consequences and liabilities it entails.

Where the Unseaworthiness?

Here the entire claim stands or falls on the answer to one question: was the lighting in hold No. 5 so inadequate that it was not reasonably fit for the performance of the work at hand? If it was not, the vessel was unseaworthy. *Walker v. Harris*, 5 Cir., 1964, 335 F.2d 185, 191, 1964 A.M.C. 1759, *cert. denied*. 379 U.S. 930, 85 S.Ct. 326, 13 L.Ed.2d 342; *Texas Menhaden Co. v. Johnson*, 5 Cir., 1964, 332 F.2d 527, 528; *Delta Engineering Corp. v. Scott*, 5 Cir., 1963, 322 F.2d 11; *Vega v. The Malula*, 5 Cir., 1961, 291 F.2d 415, 1961 A.M.C. 1698. "The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: What is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or particular fitting under scrutiny, sufficient to withstand those anticipated forces?" *Walker v. Harris, supra*, 335 F.2d at 191. A realistic assessment of the conditions existing in the hold on the night of the accident leads inevitably to the conclusion that the lighting was sufficient under the circumstances — one of the circumstances being the positive, emphatic, clear instruction to Barrociere to stand fast, not come adrift.

This is not to suggest that there was no danger involved in the cleaning operation. Open hatches on both starboard and port sides of the tween deck were con-

stant potential sources of hazard for the unwary, and the men working there knew it. Barrociere certainly knew it because he had held the light toward the open hatch so that Evans could walk around it to the other side of the vessel. Evans had warned him not to move. Disregarding this advice he laid the extension light down on the deck[9] and proceeded to walk in the direction of Evans, falling through the open hatch in the process. Without the benefit of the light he had held, and with the light on the starboard side still too high to be completely effective, Barrociere may well have been unable to see where he was going.

Even assuming however that the area in which Barrociere fell was pitch-black that fact has no bearing at all on whether the lighting used for the job was adequate for the work then immediately at hand. The overwhelming weight of the testimony establishes that it *was* adequate,[10] and if at the fatal moment it was inadequate it was so only because Barrociere misused it by voluntarily relinquishing the extension light that had proven sufficient for Evans' safe passage and by voluntarily encountering a known and obvious danger.

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[9]There is no direct testimony establishing exactly when Barrociere put down the light or where he put it, but since he did not have it when he fell through the hatch, the only logical inference is that he released it before walking toward Evans.

[10]Evans and the ship's local agent both testified in effect that the lighting was sufficient and that Barrociere fell as a result of his own negligence. Barrociere testified that he fell when all the lights went out and he was left in the dark. But the District Court found that the lighting was inadequate, not nonexistent, and that finding incorporated the fact that Barrociere must have put down and walked away from the indisputably adequate extension light he held in his hand (App. 67, 180).

This is more than a mere statement of 100% contributory negligence. Such cavalier disregard of even the most elemental precautions simply could not render the lighting equipment "unfit for its intended use." *McQuiston v. Freighters & Tankers S.S. Co.*, 5 Cir., 1964, 327 F.2d 746; *Neal v. Lykes Bros. S.S. Co.*, 5 Cir., 1962, 306 F.2d 313.[11]

And even if somehow there were unseaworthiness on these facts, it would be "instant unseaworthiness" arising from the operational negligence of Contractor through the flagrant negligence of its employee Barrociere, *United States Lines Co. v. Williams*, 5 Cir., 1966, 365 F.2d 332, 1966 A.M.C. 2418, and for this there is no "seaworthiness" liability. *Usner v. Luckenbach Overseas Corp.*, 1971, 400 U.S. 494, 91 S.Ct. ____, 27 L.Ed.2d 562 (approving our earlier holding in *Grigsby*).

REVERSED AND REMANDED

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[11] "The owner is [not] obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness." Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 550, 80 S.Ct. 926, ____, 4 L.Ed.2d 941, 948, 1960 A.M.C. 1503; Mills v. Mitsubish Shipping Co., 5 Cir., 1966, 358 F.2d 609, 613, 1966 A.M.C. ; Tropical Marine Products, Inc. v. Birmingham Fire Insurance Co., 5 Cir., 1957, 247 F.2d 116, 120.

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CALLIOPE THEODORIES, WIDOW OF
PETER PATTERSON, ET AL.

Versus CIVIL ACTION

HERCULES NAVIGATION CO., INC. ET ALS. NO. 67-231

SECTION "H"

(Filed: June 22, 1972)

OPINION

In this matter, the widow of Pete Patterson, individually and on behalf of the decedent's minor child, sued Hercules Navigation Co. (Shipowner), Petersen Marine Services, Inc. (Contractor), Carras Maritime Corp. (Agent), and LaSalle National Insurance Co. (Insurer) for damages for Patterson's alleged wrongful death which occurred aboard the vessel DEMETRIOS. It was alleged that the death was proximately caused by the negligence of Shipowner, Contractor, and Agent and the unseaworthiness of the DEMETRIOS.

After a full trial on the merits, the trial judge, sitting without a jury, held that Shipowner was liable to plaintiffs for damages because Patterson's death was proximately caused by the unseaworthiness of the DEMETRIOS. On appeal the judgment was reversed by the Court of Appeals for the Fifth Circuit, and the matter remanded to the District Court, presumably for a determination on the issue of the liability of defendants

to plaintiffs on the basis of negligence. Theodories v. Hercules Navigation Co., 448 F.2d 701 (C.5 1971). Such determination can be made by the District Court on the basis of the Appendix prepared for the Court of Appeals (including the trial transcript) and the various exhibits introduced at the trial.

The facts are succinctly set forth in the opinion of the Court of Appeals (448.F.2d 702-703) and need not be repeated here. Of course, the death and any possible negligent acts or omissions having taken place on navigable waters, the maritime law is applicable. Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171, 45 S.Ct. 39, 69 L.Ed 228 (1924); The Plymouth, 3 Wall.20, 70 U.S. 20, 18 L.Ed (1866). Under the maritime law it was the duty of defendants to decedent to exercise due care under the circumstances. Kermerec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed. 2d 550 (1959).

A careful review of the Appendix and exhibits has convinced the Court that there was no showing at the trial that any defendant breached any duty to decedent. Decedent, a visitor aboard the vessel (App. 128, 212), died of a sudden heart attack after briefly exerting himself in assisting in the rescue of an employee of Contractor who had fallen through an open hatch into a hold. The Court of Appeals characterized the heart attack as ". . . unexpected, unforeseen . . ." 448 F. 2d 702. There was no showing that any of defendants had any knowledge of decedent's heart condition (App. 144, 217) or should have taken any special precautions on his behalf. There was no showing that any defendant did anything which it should not have done or failed to do anything which it should have done. As noted by the Court of Appeals, the

death of Patterson was not foreseeable by defendants.

Recovery by plaintiffs would be possible if it could be said that the negligence of any defendant caused Contractor's employee to fall into the hold. However, the Court of Appeals, noting that the lighting in the area of the accident was "sufficient" and "adequate", held that the employee's accident was a result of his own ". . . cavalier disregard of even the most elemental precautions . . . " 448 F. 2d 706.

The only other plausible basis for recovery by plaintiffs would be a showing that decedent suffered his heart attack because his exertions were necessary because the crew members of the DEMETRIOS were incompetent and/or were handling the rescue operation blunderlingly. But the record clearly demonstrates that there was no shortage of help, that the captain and crew were competent to handle the rescue operation, and that the operation did in fact proceed smoothly and successfully. App. 145-147, 209, 221; Anastrasiou Dep. 25-26, 46-47; Vorrias Dep. 44-46.

It is the holding of the Court that there simply is not sufficient evidence to support plaintiffs' claim that the negligence of any defendant was the proximate cause of Patterson's death. There should therefore be judgment in favor of all defendants and against plaintiffs, dismissing plaintiffs' claims with prejudice and dismissing the cross-claims of Shipowner and Contractor.

Let judgment issue accordingly.

New Orleans, Louisiana, this 22d day of June, 1972.

s/ R. Blake West
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2746

CALLIOPE THEODORIES, Widow of
PETE PATTERSON, Individually, Etc.,
Plaintiff-Appellant,

versus

HERCULES NAVIGATION CO., INC., ET AL.,
Defendants-Third Party
Plaintiffs,

versus

PETERSON MARINE SERVICE, INC.,
Third Party
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 29, 1973)

Before COLEMAN and SIMPSON, Circuit Judges and ESTES, District Judge.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

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U. S. COURT OF APPEALS
FILED
APR 23 1973
EDWARD W. WADSWORTH
CLERK

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2746

CALLIOPE THEODORIES, Widow of
PETE PATTERSON, Individually, Etc.,
Plaintiff-Appellant,

versus

HERCULES NAVIGATION CO., INC., ET AL.,
Defendants-Third Party
Plaintiffs,

versus

PETERSON MARINE SERVICE, INC.,
Third Party
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(APRIL 23 , 1973)

Before COLEMAN and SIMPSON, Circuit Judges and ESTES, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

FILE COPY

AUG 15 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-143

CALLIOPE THEODORIES, widow of PETE PATTERSON, Individually, and as Administratrix of the Succession of Pete Patterson, etc.,
Petitioner

versus

HERCULES NAVIGATION CO., INC.,
(eliminated as defendant)

and

PETERSON MARINE SERVICES, INC.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(No. 72-2746)

RESPONDENT'S BRIEF IN OPPOSITION

C. ELLIS HENICAN
ATTORNEY FOR PETERSON
MARINE SERVICES, INC.
Suite 4440
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO. 73-143

CALLIOPE THEODORIES, widow of PETE PATTERSON, Individually, and as Administratrix of the Succession of Pete Patterson, etc.,

Petitioner

versus

HERCULES NAVIGATION CO., INC.,
(eliminated as defendant)

and

PETERSON MARINE SERVICES, INC.,
Respondent

- - - - - - - -

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent, Peterson Marine Services, Inc., opposes the petition for a writ of certiorari filed herein for the reasons hereinafter set forth.

This is a matter which involves solely (i) a determination made by the United States District Court for the Eastern District of Louisiana, New Orleans Division, to the effect that upon considering all of the evidence, the plaintiff failed to establish any negligence on the part of respondent, Peterson Marine Services, Inc., including its agents, servants and employees (Petitioner's Appendix C, at p. 53), and (ii) affirmation by the Fifth Circuit Court of Appeals under Local

Rule 21, since the Judgment of the District Court was based on findings of fact which were not clearly erroneous and there was no error of law (Petitioner's Appendix D, at p. 56).

Petitioner has not represented, and is unable to represent, to this Court, that the Fifth Circuit Court of Appeals was not justified in finding that the Trial Court's decision was not clearly erroneous. Petitioner, therefore, approaches this case in her petition for certiorari as though she were before the Trial Court and she patently ignores the fact that in a negligence case (and this is purely and simply a negligence case)[1], the Appellate Court does not have the right to examine the record with the idea of deciding the case in the first instance, but rather its obligation is to determine whether or not the findings of fact by the Trial Court were, or were not, clearly erroneous.

The refusal to grant certiorari in this case will not affect other cases, will be of no importance to the public, will present no conflict of opinion and authority between the Circuit Courts of Appeals and will not change in any manner whatsoever the substantive law applicable to the rescue doctrine in maritime

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1/ There is included as Appendix A hereto at pp. 12-21 a copy of the original Complaint which includes the allegations of negligence charged to respondent in Article 10(B). The Fifth Circuit Court of Appeals eliminated the question of "unseaworthiness", but the negligence charges remained throughout.

or other cases. On the contrary, the denial of the application will merely affirm the fact that when a Circuit Court of Appeals finds a situation that fits Local Rule 21 of the Fifth Circuit, a decision based upon the fact will have "no precedential value". A copy of said Local Rule 21 is printed in Appendix B hereto at page 22.

The now sterile judgment referred to on Page 2 of the petition for certiorari was not based upon negligence per se. It was based upon alleged unseaworthiness of a vessel; and the Fifth Circuit Court of Appeals reversed the judgment in its entirety (reported at 448 F.2d 701). As will be noted, the Appellate Court remanded the case to the District Court and, after considering all of the record in the light of the ruling of the Fifth Circuit Court of Appeals, the Trial Judge found that there was no negligence whatsoever on the part of respondent, or anyone for whose actions respondent might have been responsible (Petitioner's Appendix C at p. 53). The Fifth Circuit Court of Appeals found no error in the second judgment and affirmed same (Petitioner's Appendix D at p. 56).

It is respondent's position that this Court's only function in the present instance is to determine whether or not the action of the Fifth Circuit Court of Appeals was right or wrong in disposing of the case under its Local Rule 21, and upon finding that the Trial Court was not clearly erroneous and there was no error of law.

QUESTIONS PRESENTED BY PETITIONER

It is also respondent's position that the alleged "Questions Presented" on Page 3 of petitioner's application are not an appro-

priate basis for granting certiorari in this case, because the Fifth Circuit Court of Appeals did not hold contrary to the established rescue doctrine; nor did it abolish the concept of "respondeat superior" in maritime cases, albeit in any cases; nor did it substitute a rule of "caveat salvator".

Both Courts, at the trial and appellate levels, carefully considered the rescue doctrine and the concept of "respondeat superior", but the Trial Judge held that there was no negligence upon which the rescue doctrine could be applied; and, upon finding a complete absence of negligence on the part of respondent or anyone for whose acts it might have been responsible, the concept of "respondeat superior" became unimportant and inapplicable.

Because of the action taken by the District Judge and the Appellate Court, the obvious answer to both questions presented by petitioner is NO!

COUNTERSTATEMENT OF THE CASE

Respondent does not concur in the statement made by petitioner at page 4 of her petition, to the effect that the essential facts of this case are not in dispute. To the contrary, the only pertinent fact over which there was no serious dispute was that Pete Patterson, the alleged rescuer, died aboard the SS DEMETRIOS on April 5, 1966.

At the time that the Fifth Circuit Court of Appeals reversed the judgment in favor of petitioner by finding that there was no unseaworthiness, Chief Judge John R. Brown commented upon the condition of the record by noting:

> "We find it unnecessary to independently evaluate the extended, confused and frequently conflicting testimony on such questions as who owned the lights (Shipowner and Contractor each claims the other provided them) and whether they remained on at all times (Barrociere testified the lights went out completely, leaving him in total darkness)." See Footnote 4 at 448 F.2d 701 at 703.

In addition, there was a serious dispute on the important question of "proximate cause" and whether or not the alleged rescuer died as a result of a coronary thrombosis which he had suffered approximately eighteen hours before his death. (See Footnote 8, at 448 F.2d 701 at 704).

According to respondent's understanding of the record, the relevant facts are briefly summarized as follows:

The SS DEMETRIOS was in the Port of New Orleans and her holds had to be thoroughly cleaned to permit her to load a cargo of grain. Respondent was engaged by the shipowner to clean the holds. Pursuant to this assignment, respondent used approximately forty workmen and while several of these workmen were in the No. 5 hold, one George Barrociere was assigned the task of holding a portable light. Shortly thereafter Barrociere fell into the hold and suffered severe injuries as a result thereof.

Pete Patterson, the alleged rescuer, was not a member of the crew of the vessel or an employee of respondent, and had no valid reason for being on the SS DEMETRIOS at the time of his death, except that he accompanied his friend, a ship chandler, aboard the vessel when the latter was making

a delivery of ship supplies. The fact that Pete Patterson exerted himself while assisting the ship chandler in delivering the supplies may well have been the sole cause of his demise. There was also a serious factual dispute as to whether or not Pete Patterson actually engaged in the alleged rescue to any extent whatever and, if he did so, whether or not his participation caused his death. Obviously, the Trial Court's ruling, as affirmed by the Fifth Circuit Court of Appeals, answered these questions in the negative, or left them without their need for an answer.

REASONS FOR REFUSING WRIT

This is a simple case involving negligence vel non. The Trial Judge was upheld by the Fifth Circuit Court of Appeals, because it found substantial credible evidence to support the conclusion of the Trial Judge. Consequently, the Appellate Court affirmed under Rule 52(a) of the Federal Rules of Civil Procedure. In doing so, it did not establish a new doctrine, it actually followed the well established jurisprudence relative to the scope of appellate review as enunciated in Cleo Syrup Corp. v. Coca Cola Co., 8 Cir. 1943, 139 F.2d 416, 150 A.L.R. 1056, cert. denied 321 U.S. 781, 64 S.Ct. 638, 88 L.Ed. 1074, in which Judge Sanborn succinctly stated the applicable law as follows:

> "This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. (Citing Cases). The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. (Citing Cases). In a non-jury case, this court may not set aside a finding of fact of a trial court unless there

> is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law. (Citing Cases). The District Court, in making its findings was under no misapprehension as to the applicable law. (Citing Cases). In determining whether there is any sufficient evidentiary basis for the court's findings of fact, we must take that view of the evidence and the inferences deducible therefrom which is most favorable to the plaintiff." (Emphasis added).

To the same effect are Mc Allister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20, 1954 A.M.C. 1999; Lloyd, et al. v. Gill, 5 Cir., 1969, 406 F.2d 585; Standard Dredging Corp. v. Texaco, Inc., 5 Cir., 1968, 395 F.2d 744; Chaney v. City of Galveston, 5 Cir., 1966, 368 F.2d 774; D/S Ove Skou v. Hebert, 5 Cir., 1966, 365 F.2d 341, 1966 A.M.C. 2223; 5A Moore's Federal Practice, Sec. 52.03(1), p. 2613, et seq.

In so holding, the Fifth Circuit also followed the well settled doctrine to the effect that if, from established facts, reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court. On this subject, there is no conflict among the Appellate Courts, as will be noticed from Manufacturers Casualty Insurance Company, et al v. Intrusion-Prepakt, Incorporated, 5 Cir., 1959, 264 F.2d 758; Federal Security Insurance Company v. Smith, 10 Cir., 1958, 259 F.2d 294.

This is why the Fifth Circuit Court of Appeals decided the case under its own Rule 21, for if it had intended to overrule

established doctrines as represented by petitioner in her petition for certiorari, the Court of Appeals would have issued a full opinion in which it would have either specifically overruled the so-called established rescue doctrine or in differentiating its holding herein from the cases representing the so-called established doctrine.

The Fifth Circuit Court of Appeals reviewed the record of this case on two separate occasions. First, in 448 F.2d 701 (1971), and again in 474 F.2d 1345 (1973). It is highly significant that in her application for rehearing on the first appeal, petitioner herein called upon the Fifth Circuit Court of Appeals to hold respondent negligent, despite the fact that the Court had reversed on the question of "unseaworthiness", citing Reid v. Fargo, 241 U.S. 544, 36 S.Ct. 712, 60 L.Ed. 1156. But the Fifth Circuit refused to so hold, based upon the record that was then before it. The record remained the same and the Trial Judge, West, decided the case on precisely the same record that had been previously made up. The petitioner took the position that Trial Judge West should not admit further evidence, but should decide the case on the record as then constituted, and he complied.

There were also serious factual questions as to the important problem of "proximate cause". In Footnote 8, in 448 F.2d 701, at 704, Chief Judge John R. Brown, upon noting that Pete Patterson's death was not the direct consequence of an unseaworthy condition that necessitated the rescue, nor was it the direct result of any negligence on the part of respondent or any of its employees, and giving petitioner the full value of her argument on "proximate cause",

commented as follows:

> "Viewed from any angle this sort of for-want-of-a-nail-the-shoe-was-lost 'proximate cause' stretches both GRIGSBY logic[2/] and the limits of the English language very, very far, and an audible recitation proves it, for it sounds more than a little strange to say that Patterson's death on the well-lighted main deck was 'caused' by inadequate lighting in hold No. 5."

Petitioner assumes that the record is uncontraverted on the question of the negligence of one of respondent's employees. This is not a fact. The fact is that the Trial Judge completely absolved respondent and its employees from any negligence whatever and the Fifth Circuit Court of Appeals has held that this basic holding was not clearly erroneous.

The Trial Judge and the Appellate Court did not fail to take cognizance of the rescue doctrine. They merely held that there was no negligence on the part of respondent, or of its employees, which would fix liability on respondent by the application of the rescue doctrine, assuming, but by no means admitting, that Pete Patterson was, in fact, a rescuer.

As set forth above, there was a sharp dispute as to whether or not Patterson was, in fact, a rescuer, and, even if he did occupy that status, which is denied, there was a serious dispute as to whether or not

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2/ Referring to Grigsby v. Coastal Marine Service of Texas, Inc., 5 Cir., 1969, 412 F.2d 1011.

he was justified in believing that a sufficent emergency existed to warrant any action on his part, particularly when he knew, or should have known, that he had suffered a heart attack within eighteen hours prior thereto and that respondent was doing everything that could reasonably be done to effect the rescue of Barrociere.

It is singularly strange that petitioner is unable to charge respondent with any negligence, either toward the alleged rescuer or toward the employee who was allegedly being rescued. The sole charge is that the injured employee negligently injured himself, and the evidence shows that if the alleged negligent act occurred (which is specifically denied), it was contrary to specific instructions that had been given to the employee by respondent, his employer.

CONCLUSION

The issue in the present negligence case is one which involves only a well established rule of law applicable to the scope of appellate review of a judgment in an action involving seriously disputed facts and the evidence in support thereof and no amount of rhetoric on the part of petitioner can convert it into one warranting review on certiorari. Because the Trial Judge decided this simple negligence case according to his evaluation of the evidence (by holding that respondent was not guilty of any negligence whatever), and because the Fifth Circuit Court of Appeals found that the Trial Judge was not clearly erroneous in so holding, it is respectfully submitted that the petition for a writ of certiorari should be denied. Such a holding will not establish a novel question in Federal maritime jurisprudence and will not conflict in any way with any prevailing jurisprudence

of this Court, or of the Court of any other state, but will be consistent with all of the pertinent decisions applicable to the matter under consideration.

Respectfully submitted,

C. ELLIS HENICAN
Suite 4440
One Shell Square
New Orleans, Louisiana

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, C. ELLIS HENICAN, Attorney for the respondent in the foregoing Opposition and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing Opposition on Harold H. Wedig, Esq. and John M. Coman, Jr., Esq.,by mailing copies thereof, postate prepaid, addressed to their office, on this 14th day of August, 1973.

C. ELLIS HENICAN

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CALLIOPE THEODORIES, WIDOW OF PETE PATTERSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF PETE PATTERSON (PANAGIOTIS D. PAPADOPOULOS) AND AS NATURAL TUTRIX FOR AND ON BEHALF OF HER MINOR CHILD, DIOGENES P. PAPADOPOULOS (PATTERSON)	:	CIVIL ACTION NUMBER 67-231
PLAINTIFF	:	SECTION G
versus	:	
HERCULES NAVIGATION CO., INC., CARRAS MARITIME CORP., PETERSON MARINE SERVICES, INC., AETNA CASUALTY AND SURETY CO.	:	
DEFENDANTS	:	

COMPLAINT

The complaint of Calliope Theodories Patterson, widow of Pete Patterson, individually and as Natural Tutrix of her minor child, Diogenes Papadopoulos (Patterson), and as Administratrix of the Succession of Pete Patterson, of legal age and a resident of the Parish of Jefferson, State of Louisiana, alleges as follows:

1.

Plaintiff is of the full age of majority, a citizen of the United States of America, and a resident of the Parish of Jefferson,

State of Louisiana, residing at 332 Edinburgh, Metairie, Louisiana.

2.

That plaintiff is the mother of the minor, Diogenes P. Papadopoulos (Patterson) born February 6, 1959, at New Orleans, Louisiana, of the union of plaintiff and her deceased husband, Pete Patterson (Panagiotis D. Papadopoulos); that plaintiff is the duly appointed natural tutrix of the minor aforesaid and duly appointed administratrix of the Succession of Pete Patterson (Panagiotis D. Papadopoulos), both in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, under Docket No. 98-554.

3.

That the defendants herein are:

A. Hercules Navigation Co., Inc., a foreign corporation domiciled in and a resident and citizen of Panama, C.A.,; that it is and was at all pertinent times a non-resident of Louisiana, with no registered agent for the service of process in the State of Louisiana; that it has, by the maintenance of a watercraft on the waterways of the State of Louisiana, at the time of the accident complained of, appointed the Secretary of State of the State of Louisiana its lawful attorney and agent for service of process within the meaning of La. R.S. 13:3479; that notice of service through the Secretary of State of Louisiana is being sent by registered mail to Hercules Navigation Co., Inc., together with a certified copy of the summons and complaint in accordance with La. R. S. 13:3479.

B. Carras Maritime Corporation, 85

Broad Street, New York, New York, a foreign corporation whom plaintiff believes is domiciled in and a resident and citizen of the State of New York; and that it is and was at all pertinent times a non-resident of Louisiana, with no registered agent for the service of process in the State of Louisiana; that it has, by the maintenance of a watercraft on the waterways of the State of Louisiana, at the time of the accident complained of, appointed the Secretary of State of Louisiana its lawful attorney and agent for service of process within the meaning of La. R.S. 13:3479; that notice of service through the Louisiana Secretary of State is being sent by registered mail to Carras Maritime Corporation, together with a certified copy of the summons and complaint in accordance with La. R.S. 13:3479.

C. Peterson Marine Services, Inc., a Louisiana corporation domiciled in and doing business in Orleans Parish, State of Louisiana.

D. Aetna Casualty and Surety Co., a foreign corporation authorized to do and doing business in the State of Louisiana, thus appointing the Louisiana Secretary of State as its registered agent for service of process.

4.

Upon information and belief, plaintiff alleges that at the time of the hereinafter described accident the vessel, DEMETRIOS, was owned, operated or chartered jointly, collectively, or individually by Hercules Navigation Co., Inc., and/or Carras Maritime Corporation, defendants herein.

5.

That on or about April 6, 1966, at approximately 1:00 a.m., Pete Patterson, also formerly known as Panagiotis D. Papadopoulos, husband of plaintiff, died aboard the vessel DEMETRIOS, tied up in navigable waters of the United States alongside the Press Street Wharf in New Orleans, Orleans Parish, Louisiana, as a direct result of the unseaworthiness of the vessel DEMETRIOS, and the carelessness, recklessness and negligence of Peterson Marine Services, Inc., its agents, servants or employees; of Hercules Navigation Co., Inc., its agents, employees and servants; and of Carras Maritime Corp., and its agents, servants and employees; and that defendants are liable to plaintiff and her said minor child, jointly, severally and in solido.

6.

On the night of April 5, 1966, Pete Patterson lawfully went aboard the vessel DEMETRIOS with Captain John Fatsis, owner and operator of Gulf Steamer Supply, to deliver some supplies to said vessel.

7.

That employees of Peterson Marine Services, Inc., were cleaning the hold or holds of said vessel, or were doing some other work upon said vessel.

8.

That George Barrociere, an employee of Peterson Marine Services, Inc., while in the course and scope of his employment, slipped and fell to the bottom of a hold

and was injured.

9.

That Pete Patterson, upon being notified of the accident and injury to George Barrociere, went to the aid of the injured worker; and as a direct result of the excitement and physical exertion of his efforts to rescue George Barrociere, Pete Patterson suffered a sudden coronary failure which resulted in his death before he could be removed from the ship.

10.

That the aforesaid accident and death of Pete Patterson was caused solely or proximately by reason of the unseaworthiness of the vessel DEMETRIOS and the joint and concurrent negligence of Hercules Navigation Co., Inc., Carras Maritime Corp., and Peterson Marine Services, Inc., without any fault whatsoever on the part of the decedent, Pete Patterson. The negligence of said parties is particularized as follows:

A. Hercules Navigation Co., Inc., and Carras Maritime Corp:

(1) The vessel DEMETRIOS was unseaworthy

(2) Failure to warn of danger on the vessel DEMETRIOS

(3) Failure to furnish a safe place to work

(4) Failure to provide adequate lighting

(5) Failure to equip vessel with adequate safety equipment

(6) Lack of competent crew

(7) Failure to adequately supervise crew, and to properly train and instruct them in case of an emergency

(8) Negligently creating a condition of danger to which Pete Patterson was subjected and which caused his death while trying to render aid

(9) Negligently creating a situation of danger or peril to themselves and to others and thereby breaching the duty owed a rescuer of one thereby imperiled.

(10) Other facts of negligence as may be shown at trial hereof.

B. Peterson Marine Services Inc.

(1) Failure to provide adequate lighting

(2) Failure to furnish, maintain or establish a safe place to work

(3) Lack of adequate safety equipment

(4) Failure to adequately supervise inexperienced crew and to properly train and instruct them

(5) Negligently creating a condition of danger to which Pete Patterson was subjected and which caused his death while trying to render aid

(6) Negligently creating a situation of danger or peril to themselves and others and thereby breaching the duty owed a rescuer of one thereby imperiled.

(7) Failure of employees to cease work in improperly lighted areas

(8) Failure to maintain proper caution for one's safety under adverse conditions

(9) Other acts of negligence as may be shown at trial hereof.

11.

Plaintiff alleges, upon information and belief, that prior to and on April 5 and 6, 1966, Aetna Casualty & Surety Co. was the liability insurer of Peterson Marine Services Inc., and their policies of insurance covered liability of the nature herein asserted.

12.

That prior to and on April 5, and 6, 1966, ABC Insurance Co., who, it is alleged on information and belief, is a foreign underwriter, was the liability underwriter of the vessel DEMETRIOS, and their policy or certificates of insurance covered liability of the nature herein asserted. The identity of ABC Insurance Co. has not been revealed to plaintiff despite request upon their local attorneys in New Orleans, Louisiana.

13.

Plaintiff alleges the wrongful death of her husband and the father of the minor,

Diogenes P. Papadopoulos (Patterson), and she asks for damages itemized as follows:

(1)	Conscious pain and suffering of deceased	$20,000.00
(2)	Funeral expenses	650.00
(3)	Loss of parental care, guidance, love, affection, companionship and future support by the minor, Diogenes P. Papadopoulos	150,000.00
(4)	Loss of love, affection, companionship, guidance and future support by Plaintiff, Calliope Patterson	150,000.00
(5)	For the wrongful death of decedent, Pete Patterson	100,000.00
	TOTAL	$420,650.00

14.

All and singular, the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, plaintiff prays that after due proceedings there be judgment herein in favor of petitioner, Calliope Patterson, individually, as Administratrix of the Succession of Pete Patterson, and as Natural Tutrix of her minor child, Diogenes P. Papadopoulos (Patterson), in the amount of Four Hundred Twenty Thousand, Six Hundred Fifty and no/100 Dollars ($420,650.00), and against defendants, Hercules Navigation Co., Inc., Carras Maritime Corp., ABC Insurance

Co., Peterson Marine Services Inc., and Aetna Casualty & Surety Co., with legal interest from judicial demand, and for all costs of this suit.

HAROLD H. WEDIG and JOHN M. COMAN, JR.

BY: S/ Harold H. Wedig
Trial Attorney
700 Maritime Building
New Orleans, La.
Proctors for Plaintiff

Please serve

Peterson Marine Service, Inc.
through its registered agent,
Dean L. Peterson
6323 Cartwright Drive
New Orleans, Louisiana

Hercules Navigation Co. Inc.
Carras Maritime Corp.
Aetna Casualty & Surety Co.
Through
Hon. Wade O. Martin, Jr.
Secretary of State
Baton Rouge, La.

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

MRS. CALLIOPE THEODORIES PATTERSON, who after being duly sworn did depose and say:

That she is the plaintiff in the foregoing petition; that she has read same and that all the facts and allegations are true and correct to the best of her knowledge.

s/ CALLIOPE T. PATTERSON

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 14th DAY
OF FEBRUARY, 1967.

s/ HAROLD H. WEDIG
NOTARY PUBLIC
not. Pub.

CERTIFICATE

The undersigned, of counsel for plaintiff, certifies that he has this date sent notice by registered mail, along with a copy of the petition and citation, to defendants, Carras Maritime Corp. and Hercules Navigation Co., under the provisions of L.R.S. Title 13, Sec. 3479 and 3480.

New Orleans, Louisiana, Feb. 15th, 1967.

s/ HAROLD H. WEDIG

APPENDIX B

FIFTH CIRCUIT

RULE 21. AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

Added July 1, 1970.